Supreme Court, U.S.
FILED

09-405 APR 20 2009

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Docket No.

In The

Supreme Court of the United States

UNITED STATES ex rel. DARIAN

Plaintiff-Petitioner,

vs.

ACCENT BUILDERS, INC., et al.

Defendant-Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

APPENDIX

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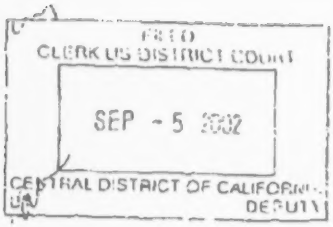
Appendix

		Pages
1.	Order Granting Moving Defendant's Motion to Dismiss	2-21
2.	Order Dismissing with Prejudice	22-32
3.	Order Granting Defendants' Motions for Summary Judgment	33-64
4.	Ninth Circuit Order	65-66
5.	Letter from Colin Stokol M.D.	67-68



UNITED STATES DISTRICT COURT
CENTRAL

DISTRICT OF CALIFORNIA

BRUCE DARIAN, individually doing business as DARIAN CONSTRUCTION CO.,	]	CV 00-10255 FMC (JWJx)
Plaintiff,	]	ORDER GRANTING MOVING DEFENDANTS' MOTION TO DISMISS
vs.	]	
ACCENT BUILDERS, INC., et al.,	]	
Defendants.	]	

This matter is before the Court on the Motion to dismiss (Docket #258) or, in the alternative. for a more definite statement, pursuant

344

to Fed. R. Civ. Proc. 8, 12(b)(l) and (6), and 12(e), brought by Moving Defendants State of California (sued as its agencies, Cal Osha, Department of Parks and Recreation, Department of General Services, Contractors State License Board, California Regional Quality Control Board, California Regional Water Quality Control Board and Judicial Counsel of California); and the following state employees, all sued in their official capacities: Rene Garcia, Rusty Areais, Tim La Franchi, Tara Todd, Douglass Wick, Tom Carver, Gary Stephens, Richard Barton, Reginald Demery, Dave Pettway, Ian Gavine, Michael Brown, Pam Albertini, Marianne Henkel, Gloria Langley, Janeece Hards, Bill Siener, Hon. Patricia Collins, Hon. Lawrence Mira and Hon. Terri Adamson.

For the reasons set forth below, the Court hereby GRANTS Moving Defendants' Motion.

I. Background

On December 12, 2001, this Court dismissed without prejudice Plaintiff's First Amended Complaint ("FAC") for its failure to comply with Rule 8(e)(1)'s requirement that "each averment of a pleading shall be simple, concise, and direct." In particular, the Court found that the FAC, which named more than 50 defendants and asserted each of its 54 causes of action against all 50 defendants, was rambling and made it impossible to determine which causes of action were asserted against which defendants. As a result, it was impossible for defendants to frame reasonable responses and mount effective defenses. *See McHenry v. Renne*, 84 F.3d 1172,1179-80 (9th Cir. 1996) ("Something

labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness, and clarity as to whom Plaintiff's are suing for what wrongs, fails to perform the essential functions of a complaint.").

On January 30, 2002, Plaintiff filed his Second Amended Complaint ("SAC"), which names more than 80 individual and corporate defendants and alleges 41 causes of action. On February 15, 2002, the instant Motion to dismiss was filed by the Moving Defendants.

II. Discussion

A. Moving Defendants' Motion to dismiss under Rule 8(e) and Motion for a More Definite Statement under Rule 12(e)

Rule 8(e)(l) provides that "Each averment of a pleading shall be simple, concise and direct." *See*

Fed. R. Civ. Proc. 8. Failure to comply with Rule 8(e) provides a basis for dismissal.

In considering a Rule 12(e) motion for a more definite statement, the Court must be mindful of the liberal pleading requirements of Federal Rule of Civil Procedure 8(a), pursuant to which a short and plain statement of the claim will suffice. *Betancourt v. Marine Cargo Management, Inc.*, 930 F.Supp. 606, 608 (S.D.Fla. 1996). Because these liberal pleading requirements are offset by broad discovery rights, a motion for more definite statement should not be granted unless the complaint is so vague or ambiguous that the opposing party cannot frame a responsive pleading. *Famolare et al. v. SCOA Industries*, 525 F.Supp. 940, 949 (E.D.Cal. 1981). Discovery is not the purpose of Rule 12(e). *Id.*

Moving Defendants claim that despite Plaintiff's efforts to improve upon his FAC, his Second Amended Complaints continues to run afoul of Rule 8(e)'s requirement that pleadings be "simple, concise, and direct." First, counsel for the Moving Defendants claims that it is virtually impossible to determine which causes of action are asserted against which defendants. This claim is mistaken; the Complaint clearly and unambiguously lists precisely which defendants are being charged under each cause of action. Accordingly, defendants are placed on clear notice of which claims they must defend.

Second, counsel for the Moving Defendant contends that it is virtually impossible to determine what conduct of defendants is alleged by plaintiff to have violated the various statutory provisions

which are pleaded. Again, this contention is mistaken. The SAC, starting at ¶94 and continuing until ¶491, spells out in detail Plaintiff's specific allegations against each defendant. Those allegations are made in an orderly fashion. For example, all of the allegations against defendant Halco Electric are contained in ¶¶297 through 306, all allegations against defendant Bookout Plumbing are then made in ¶¶307 through 320, all allegations against defendant L.A. County District Attorney are made in ¶¶321 through 334, and so on. Then, under each cause of action Plaintiff merely states the statutory language giving rise to each claim (e.g., ¶500 lists the statutory text of 18 U.S.C. §1342) and then lists each of the defendants whom he is charging under that cause of action. Plaintiff specifically incorporates his previous

allegations (including ¶¶94 through 491) into each cause of action. When, for example, defendant Halco Electric is charged with violating federal mail fraud law under 18 U.S.C. §1342, Halco must refer back to the specific allegations made against it in ¶¶297 through 306 to determine the factual basis for Plaintiff's mail fraud claim against it. Moving Defendants' contention that Plaintiff's pleading approach is insufficiently specific is without merit. To the contrary, Moving Defendants' apparent suggestion, that Plaintiff restate under each cause of action his specific allegations against each defendant, would transform an already tome-like pleading into a veritable encyclopedia-length document. Such an approach is undesirable and unnecessary, for the Complaint already puts defendants on clear notice of the allegations and

claims against them and therefore satisfies the Federal Rules of Civil Procedure's liberal "notice pleading" standards.

Moving Defendants' Motion to dismiss under Rule 8 and Motion for a more definite statement under Rule 12(e) are denied.

B. Previously dismissed cause of action

As discussed previously in various Court Orders regarding other Defendants' Motions to dismiss, the 2nd, 5th, 6th, 7lh, 9th, 12th through 28th, and 30th through 40lh causes of action are dismissed as against all Defendants, including Moving Defendants. *See e.g. Halco Electric Order; Malibu Defendants' Order; Lambertson Order.*

C. Moving Defendants' Motion to dismiss remaining claims based on Eleventh Amendment Sovereign Immunity

1. State of California and its agencies

The Eleventh Amendment to the U.S. Constitution provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State." Courts have interpreted the Eleventh Amendment as barring a federal court from hearing claims by individuals against a State, unless the State consents to suit or Congress has expressly abrogated the State's immunity pursuant to Section 5 of the Fourteenth Amendment. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Florida Prepaid Postsecondary Education Expense Fund v. College Savings Bank*, 527 U.S. 627 (1999).

Eleventh Amendment immunity bars suits not only against the States themselves, but also against the States' agencies. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) ("It has long been settled that the [Eleventh Amendment's] reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and instrumentalities.") In order to invoke Eleventh Amendment immunity, an entity must be an "arm" of the State. *See State of California v. Campbell* 138 F.3d 784, 786 (9th Cir. 1998); *see also California Government Code §900.6* (" 'State' means the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by

warrants drawn by the Controller."). Cal Osha, the Department of Parks and Recreation, the Department of General Services, the Contractors State License Board, the California Regional Quality Control Board, the California Regional Water Quality Control Board and the Judicial Counsel of California are certainly arms of the State of California.

Plaintiff has failed to demonstrate that the State of California and its agencies have consented to suit in the instant action. Moreover, Plaintiff has failed to demonstrate that Congress expressly abrogated the States' sovereign immunity in enacting any of the federal statutes under which Plaintiff has brought suit.[1] Finally, the Eleventh

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[1] In addition, a State and its agencies are not considered "persons" subject to suit under section 1983, see

Amendment bars federal courts from considering any purely state law claims against a state, state agency, or state official acting in his or her official capacity. *See Pennhurst State Sch. and Hosp. v.*

Will v. Michigan Dep't of State of Police, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983"), or under the False Claims Act, see *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 J.S. 765, 787-88, 120 S.Ct. 1858, 1870 (2000) ("In sum, we believe that various features of the CA, both as originally enacted and as amended, far from providing the requisite affirmative indications that the term "person" included States for purposes of qui tam liability, indicate quite the contrary.... the False Claims Act does not subject a State (or state agency) to liability in [False Claims Act] actions"). Finally, Eleventh Amendment immunity applies to claims brought against a state under the Clean Water Act. See *Natural Resources Defense Council v. California Dept. of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996).

Halderman, 465 U.S. 89,106,104 S.Ct. 900 (1984); *Gamboa v. Rubin*, 101 F.3d 90, 91-92 (9th Cir. 1996) (Eleventh Amendment generally bars suits against state governments in federal court based on violations of state law).

Therefore, Plaintiff's claims against the State of California and its agencies are barred and are hereby dismissed with prejudice.

2. State employees sued in their official capacities

Because the State of California and its agencies enjoy immunity from Plaintiff's claims, co-Defendants Rene Garcia, Rusty Areais, Tim La Franchi, Tara Todd, Douglass Wick, Tom Carver, Gary Stephens, Richard Barton, Reginald Demery, Dave Petrway, Ian Gavine, Michael Brown, Pam Albertini, Marianne Henkel, Gloria Langley,

Janeece Hards, and Bill Siener are also immune under the Eleventh Amendment. Plaintiff has sued those individuals in their official capacities for retrospective relief. Therefore, to the extent that the State and its agencies enjoy sovereign immunity under the Eleventh Amendment, the agencies' officials will be afforded similar protection. *See Witt v. Michigan Dep't of State of Police*, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.") (internal citations omitted).

Although a plaintiff may sue state officials in their official capacities to enjoin future violations of federal law, *see Ex Parte Young*, 209 U.S. 123,159-

60, 28 S.CL 441 (1908), Plaintiff's Complaint does not seek such relief from the named state officials.[2] Moreover, state law claims brought against state officials acting in their official capacity are barred by the Eleventh Amendment, even if only prospective injunctive relief is sought. There is no ex Parte Young exception for state Jaw claims. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89,106,120-22 (1984); Pena v. Gardner, 976 R2d 469,473 (9th Cir. 1992); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261,290,117

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[2] Although Plaintiff contends in his Opposition that he seeks injunctive relief pertaining to alleged pollution, it is clear from his allegations that the alleged polluting acts or omissions are completed. *See e.g. Opposition* at 16-18. He does not contend that the State agencies are committing any ongoing violations of the Clean Water Act that could merit prospective, injunctive relief pursuant to *Ex Parte Young*.

S.Ct. 2028, 2044 (J. O'Connor, concurring) (citing *Pennhurst* for the proposition that "plaintiff cannot invoke Young doctrine based solely on alleged violation of state law.").

Plaintiff's claims against state officials Rene Garcia, Rusty Arcais, Tim La Franchi, Tara Todd, Douglass Wick, Tom Carver, Gary Stephens, Richard Barton, Reginald Demery, Dave Pettway, Ian Gavine, Michael Brown, Pam Albertini, Marianne Henkel, Gloria Langley, Janeece Hards, and Bill Siener in their official capacities are hereby dismissed without prejudice.

Finally, Plaintiff's claims against the Hon. Patricia Collins, the Hon. Lawrence Mira, and the Hon. Terri Adamson are hereby dismissed with prejudice, as those three Defendants enjoy absolute immunity for any actions taken in their judicial

capacity. *See Mireles v. Waco*, 502 U.S. 9, 12, 112 S.Ct. 286, 288 (1991); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Because Plaintiff's claims against those three are based on their prior judicial decisions in cases in which Plaintiff was a party, Plaintiff's claims against them are dismissed with prejudice.[3]

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[3] Plaintiff alleges in his Opposition that Judges Collins and Adamson are not entitled to judicial immunity because their judicial actions were predetermined as they had conspired with prosecutors and with receiver David Pasternak. In support of this allegation, however, Plaintiff cites to *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), which was directly overruled by the Ninth Circuit in *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) ("We therefore hold that a conspiracy between judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges and prosecutors. As long is the judge's ultimate acts are judicial actions taken within the court's

III. Conclusion

The Court hereby GRANTS Moving Defendants' Motion to dismiss (Docket #258). All of Plaintiff s claims against the State of California and its agencies are dismissed with prejudice. All of Plaintiff's claims against Judges Collins, Mira, and Admanson are dismissed with prejudice. As against the state officials Rene Garcia, Rusty Areais, Tim La Franchi, Tara Todd, Douglass Wick, Tom Carver, Gary Stephens, Richard Barton, Reginald Demery, Dave Pettway, Ian Gavine, Michael Brown, Pam Albertini, Marianne Henkel, Gloria

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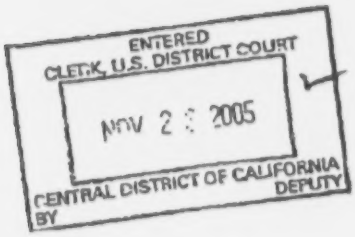
subject matter jurisdiction, immunity applies... To the extent that Rankin and Beard are to the contrary, they are overruled "); See also *Moore v. Brewster*, 96 F.3d 1240, 1244 (9th Cir. 1996) (stating "Nor is judicial immunity lost by allegations that a judge conspired with one party to rule against another party" and citing to *Ashelman*).

Langley, Janeece Hards, and Bill Siener, all sued in their official capacities, the following causes of action are dismissed with prejudice: 2,5,6,7,9,12 through 28, and 30 through 41; and the following causes of action are dismissed without prejudice: 1,3,4,8,10, and 11. If Plaintiff chooses to replead those causes of action which have been dismissed without prejudice he must do so within 30 days of the Date of this Order. Otherwise, Defendants are to Answer the Second Amended Complaint within 20 days after the expiration of the deadline to amend the Complaint.

IT IS SO ORDERED.

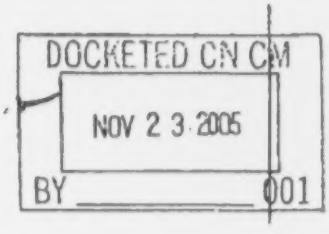
September 4, 2002 /s/
FLORENCE-MARIE COOPER
JUDGE UNITED STATES
DISTRICT COURT



UNITED STATES DISTRICT COURT
CENTRAL

DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel, BRUCE DARIAN, individually doing business as DARIAN CONSTRUCTION CO.,	CV 00-10255 FMC (JWJx)
Plaintiff,	ORDER DISMISSING WITH PREJUDICE
vs.	
ACCENT BUILDERS, INC., et al.,	
Defendants.	



For the reasons and in the manner set forth below, the Court hereby finalizes the disposition of the following claims against the following parties.

622

I. Procedural Background

The parties are familiar with the factual and procedural history of this case, and both are detailed in many of the Court's previous orders.

On January 7, 2005, the Court issued multiple orders in connection with this lawsuit. Each order addressed the dismissal of a variety of Plaintiff's claims against the various defendants in this case. Some claims were dismissed with prejudice, and some were dismissed without prejudice. In two of the January 7, 2005 orders (discussed below), the Court denied the moving defendants' motions to dismiss a particular cause of action against them. Each of the Court's January 7, 2005 orders required Plaintiff to file a Fourth Amended Complaint within 60 days of the date of the order. Additionally, Plaintiff was advised that

he would have to retain counsel to pursue the Qui Tarn portion of his litigation.

In August 2005, the Court denied various defendants' Motions to Dismiss for Failure to Comply with Court Order because the 60-day limit to file a Fourth Amended Complaint was tolled during the months of February through July, while Plaintiff's appeal to the Ninth Circuit was pending. Plaintiff's appeal was dismissed by the Ninth Circuit in late July 2005. Therefore, as of August 5, 2005, Plaintiff still had approximately 19 days to file an amended complaint.

II. Discussion and Conclusion

The Court gave Plaintiff specific guidelines to meet in filing a Fourth Amended Complaint, and Plaintiff failed to comply with those guidelines. He did not file and serve a Fourth Amended Complaint

within the allotted 60 days, i.e. by August 24, 2005. A review of the docket confirms that all claims against certain defendants are dismissed with prejudice due to Plaintiff's failure to comply with the Court's January 7, 2005 orders. Accordingly, the Court dismisses Plaintiff's Third Amended Complaint with prejudice to the defendants listed below.[4]

Pursuant to the Court's orders dated January 6, 2005[5]:

Pam Albertini

Rusty Areais

Darlene Atkinson

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[4] Appendix A, attached to this Order, provides a alphabetical list of all defendants listed below.

[5] These orders was filed January 7, 2005, and they were docketed on January 11, 2005.

Richard Barton

Bookout Plumbing, Inc.

Harold Bookouts

Michael Brown

California Regional Water Quality Control Board

Tom Carver

James Colbaugh

Reginald Demery

Susan Gannuscio

Rene Garcia

Ian Gavine

Janeece Hards

Marianne Henkel

Christi Hogins

International Hardwoods Inc.

Judicial Council of California

Tim La Franchi

Lamberson Koster and Company

Las Virgenes Municipal Water District

Los Angeles County, Sanitation District No. 2

Gloria Langley

Wayne K. Lemieux

Malibu, City of

Pepperdine University

Dave Pettway

Phil E. Phillips

Don Robinson, doing business as Arrow Security

Bill Siener

Gary Stephens

Tara Todd

Douglass Wick

Don Wippert

Pursuant to the Court's January 12, 2005 Order:

Gray Davis

Bill Lockyer

The Court's September 22, 2005 Order Denying as Moot Defendants' Motions for Involuntary Dismissal confirmed the dismissal, with prejudice, of Plaintiff's Third Amended Complaint as to the following defendants:

Le Roy Baca

Thorn Bradstock

Heath Carrs

DCA Drilling and Construction Inc.

Fibrwrap Construction Co.

Fyfe Company

Ed Fyfe

Halco Service Corp.

Martin L. Herscowitz

Allyson Kimmel

Los Angeles County (erroneously named as "Office of the Los Angeles County District Attorney" and Los Angeles County Sheriff's Department)

Ernesto Massone

Pat May

Marna Miller

John O'Brien

Harold Orums

Ken Patrick

Mike Wilson

Pursuant to the Court's November 10, 2005 Order:

Malibu Bay Company

A. Jerold Perenchio.

IT IS SO ORDERED.[6]

November 22, 2005 ____/s/_____
FLORENCE-MARIE COOPER
JUDGE UNITED STATES
DISTRICT COURT

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[3] Accordingly, the following are the only remaining causes of action in this lawsuit: (1) Plaintiffs' eighth cause of action against Defendants Anthony Lawrence Federico and Ronald Ray Federico ("Federico Defendants"), and (2) Plaintiffs' eighth cause of action against Defendants Accent Builders Inc., Superior Gunite, Robert G. Kelly, National Union Fire Insurance, and American International Group

APPENDIX A
To
November 22, 2004 Order Dismissing with Prejudice

Pam Albertini
Rusty Areais
Darlene Atkinson
Le Roy Baca
Richard Barton
Bookout Plumbing, Inc.
Harold Bookouts
Thorn Bradstock
Michael Brown
California Regional Water Quality Control Board
Heath Carrs
Tom Carver
James Colbaugh
DCA Drilling and Construction Inc.
Gray Davis
Reginald Demery
Fibrwrap Construction Co.
Fyfe Company
Ed Fyfe
Susan Gannuscio
Rene Garcia
Ian Gavine
Halco Service Corp.
Janeece Hards
Marianne Henkel
Martin L. Herscowitz
Christi Hogins
International Hardwoods Inc.
Judicial Council of California
Allyson Kimmel
Tim La Franchi
Lamberson Koster and Company
Las Virgenes Municipal Water District
Gloria Langley
Wayne K. Lemieux
Bill Lockyer
Los Angeles County (erroneously named as "Office of the Los Angeles County District Attorney" and "Los Angeles County Sheriff's Department")
Los Angeles County, Sanitation District No. 2
Malibu, City of
Ernesto Massone

Pat May
Marna Miller
John O'Brien
Harold Omms
Ken Patrick
Pepperdine University
Dave Pettway
Phil E. Phillips
Don Robinson, dba
Arrow Security
Bill Siener
Gary Stephens
Tara Todd
Douglass Wick
Mike Wilson
Don Wippert

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FILED
CLERK, U.S. DISTRICT COURT
JUN 21 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL

DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel., DARIAN,	]	CV 00-10255 FMC (JWJx)
Plaintiff,	]	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
vs.	]	
ACCENT BUILDERS, INC., et al.,	]	
Defendants.	]	

ENTERED
CLERK, U.S. DISTRICT COURT
JUN 22 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

This matter is before the Court on

Defendants Accent Builders, Inc., Superior Gunite,

(749)

American International Group, Robert G. Kelly, and National Union Fire Insurance Company of Pittsburgh's Motion for Summary Judgment and/or Summary Adjudication of Claims (docket no. 693), and Defendants Anthony Federico and Ronald Federico's Motion for Summary Judgment and/or Partial Summary Judgment and/or Summary Adjudication of Claims (docket no. 698), filed January 3 and 8, 2007, respectively. The Court has read and considered the moving, opposition, and reply documents submitted in connection with these motions. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons and in the manner set forth below, the Court hereby GRANTS Defendants' Motions.

EVIDENTIARY OBJECTIONS

Plaintiff Bruce Darian objects to the Defendants' characterization of his responses to the interrogatories Accent Builders, Inc. propounded. The Court will consider the content of Plaintiff s responses, in their entirety and in context, and will not limit its inquiry to Defendants' summary of those responses. The Plaintiff is admonished, however, that he has not made a valid evidentiary objection under the Federal Rules of Evidence. The Court overrules plaintiff's "Objection to Evidence" (docket no. 731) because it does not contest the admissibility of any piece of evidence.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 30, 2002, pro se Plaintiff Bruce Darian filed a 394-page Third Amended Complaint (TAC) that alleged the following causes of action: (1) violation of the False Claims Act under 31 U.S.C. § 3729; (2) civil rights violations under 42 U.S.C. §§ 1983 and 1985; (3) conspiracy to defraud; (4) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C. § 1961 and conspiracy to violate RICO under 18 U.S.C. § 1968; (5) violation of the Federal Water Pollution Control Act under 33 U.S.C. § 1365 and violation of the Resource Conservation Recovery Act under 42 U.S.C. § 6972; (6) liability for environmental violations for oil and hazardous substances under 33 U.S.C. § 1321; and (7)

violation of the whistle-blower protection provisions of the False Claims Act under 31 U.S.C. § 3730(h).[7] On November 22, 2005, the Court dismissed fifty-five of the defendants from the case. The remaining defendants in this action are Accent Builders, Inc. (Accent), Superior Gunite (Gunite), American International Group (AIG), Robert G. Kelly (Kelly), National Union Fire Insurance Company of Pittsburgh (National Union), Anthony Federico and Ronald Federico (collectively Defendants). The only

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[7] The Court notes that Darian *originally filed* a document captioned "Third Amended Complaint" on December 9, 2002. Subsequently, on December 30, 2002, Plaintiff filed a document captioned "Third Amended Complaint Notice of Errata." In an Order, dated January 7, 2003, the earlier-filed document was stricken, and the Court deemed that the subsequently-filed document could serve as plaintiff's Third Amended Complaint.

remaining cause of action is plaintiff's claim for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C. §§ 1961 and 1968. On January 3, 2007, Defendants Accent, Gunite, AIG, Kelly, and National Union filed their Motion for Summary Judgment (Accent Mot.). On January 8, 2007, Defendants Anthony Federico and Ronald Federico filed their Motion for Summary Judgment (Frederico Mot.). Plaintiff filed opposition papers to both motions for summary judgment on March 26, 2007. Defendants filed replies to plaintiff's Opposition to Defendants' Motions for Summary Judgment on April 9, 2007, at which point the Court took the matter under submission.

This action arises out of a construction contract between Darian Construction Company /

Accent (a joint venture) and the State of California Parks and Recreation Department (the State) for renovations of the Malibu Pier at Malibu Lagoon State Beach. (Decl. of Ronald Federico (R. Federico Decl.) at ¶¶ 3, 4.) Plaintiff has asserted a RICO claim, alleging that Defendants engaged in illegal racketeering activities as an "enterprise." (TAC ¶¶ 967-70; Opp'n to Accent Mot. at 12; Opp'n to Federico Mot. at 12.) Plaintiff has further alleged that Defendants threatened Plaintiff in an effort to extort money from him, committed mail and wire fraud, and conspired to obstruct justice by arranging for plaintiff's arrest on false vandalism charges. (TAC ¶ 966, 971-72, 975; Opp'n to Accent Mot. at 13-14; Opp'n to Federico Mot. at 13-14.) Plaintiff alleges that Ronald Federico told Plaintiff that if Plaintiff did not give Ronald Federico

$25,000 or sign over plaintiff's control over the Malibu Pier Project (Project), that Anthony Federico would break plaintiff's legs. (TAC ¶ 966.) Plaintiff also alleges that Ronald Federico warned Plaintiff that Anthony Federico was of Italian heritage, and that Plaintiff would "end up in the bottom of the ocean with cement boots on." (*Id.*) Plaintiff claims that after complaining to Ronald Federico about these threats, Ronald Federico told Plaintiff that he wanted to kill him. (*Id.*) Plaintiff also alleges that Anthony Federico threatened to arrange for individuals with baseball bats to harm Plaintiff if Plaintiff failed to give Anthony Federico $25,000. (*Id.* at 1975.)

Defendants argue that the undisputed evidence demonstrates that they did not engage in any criminal activity and that no "enterprise"

under RICO existed during the time of the alleged illegal conduct. (R. Federico Decl. at ¶ 12.) Defendants also argue that, even if they were involved in a criminal enterprise under RICO, the alleged illegal activities did not constitute a "pattern of racketeering activity," as required by RICO, because the acts occurred during a period of less than a year. (Opp'n to Accent Mot. at 10-12; Opp'n to Federico Mot. at 10-12.)

The Court finds the following facts to be undisputed. Darian Construction Company and Accent formed a joint venture to renovate the Malibu Pier located in Malibu, California, according to the State's bidding procedures. (R. Federico Decl. at ¶ 12.) The State awarded the Project contract to the joint venture on or about June 17, 1999. (Id. at ¶ 3, Ex. A.) Construction for

the Project commenced in October 1999. (R. Federico Decl. at ¶ 7.) Ronald Federico, an Accent employee, acted as the project manager. (*Id.*)

Between October 1999 and January 2000, Defendants Ronald and Anthony Federico made what Plaintiff considered threats. (*Id.* at ¶ 11.) The alleged specific threats were made between October and December 1999, and the alleged extortion threat was made on or about October 27, 1999. (*Id.* at ¶ 14.) Plaintiff obtained restraining orders against Defendants Anthony Federico and Ronald Federico, which expired by their own terms after a court found no evidence of continuing conduct or a continuing need for the restraining orders. (R. Federico Decl. at ¶15.)

On December 30, 1999, Plaintiff instructed the State to withhold payments to the joint venture

for work on the Project. (*Id.* at ¶ 7, Ex. B.) Still obligated to perform under the Contract, the joint venture continued to work on the Project, without payment from the State. (R. Federico Decl. at ¶ 9.) As a result, Accent spent over $350,000 in its own funds to continue work on the Project. (*Id.* at ¶ 9.) As of March 31, 2000, Darian Construction had not contributed any funds to the joint venture. (*Id.* at ¶ 9.) Accent filed an action to appoint a receiver. (*Id.* at ¶ 10, Ex. C.) On June 5, 2000, the Los Angeles Superior Court issued an order appointing David Pasternak as Receiver for the joint venture. (R. Federico Decl. at ¶ 10, Ex. C.) Pasternak completed Phase 1 of the Project, and negotiated termination of the remainder of the contract with the State, replacing the joint venture with a third party contractor for the Project. (R. Federico Decl. at ¶

11.) During the period of the alleged RICO "enterprise," AIG, Union Fire and Robert Kelly (the Insurance Company Defendants) were not engaged in the management or operations of the enterprise. (*Id.* at ¶ 13; Decl. of Mark Pessolano (Pessolano Decl.) at ¶ 4.) The Insurance Company Defendants provided construction security bonds for the joint venture, as required by the Malibu Pier contract terms. (R. Federico Decl. at ¶ 13; Pessolano Decl. at ¶ 3.) The Insurance Company Defendants also authorized payment of funds to Pasternak. (R. Federico Decl. at ¶ 13.)

STANDARD OF LAW

The Federal Rules of Civil Procedure require that courts grant summary judgment if the evidence, including pleadings, discovery responses,

depositions and affidavits, demonstrate that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden to identify a lack of evidence demonstrating that no genuine issues of material fact exist for essential elements of each cause of action in the complaint. *Liu v. Standard Ins. Co.*, 457 F.Supp. 2d 1030, 1035 (C.D. Cal. 2006) (citing *Celotex Corp. v. Catrett*, All U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); *Abromsom v. Am. Pac. Corp.*, 114 F.3d 898, 902 (9th Cir. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 32:5, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). A "material"fact is one that may impact the outcome of the case under substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed.

2d 202 (1986); *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass 'n*, 809 F.2d 626, 630 (9th Cir. 1987). The Court must not weigh the evidence or make credibility determinations, and views the evidence "in the light most favorable to the nonmoving party.'" *T. W. Electric*, 809 F.2d at 630.

The burden then shifts to the nonmoving party. *Liu*, 457 F.Supp. 2d at 1035. In order to survive a motion for summary judgment, the party bearing the burden of proof at trial must establish an essential element to their case. *Celotex*, 477 U.S. at 322. If the nonmoving party is unable to establish an essential element to their case, the Court must grant summary judgment because "complete failure of proof concerning an essential element... necessarily renders all other facts immaterial." *Id.* at 323. In opposition to a motion

for summary judgment, the nonmoving party may not "rest upon the mere allegations or denials of [their] pleading." Fed. R. Civ. P. 56(c). Instead, the nonmoving party's response must establish "specific facts" demonstrating a genuine issue of a material fact. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. If the nonmoving party is unable to meet their burden, the Court must grant summary judgment. Fed. R. Civ. P. 56(e).

DISCUSSION

I. Plaintiff's Failure to Provide Specific Citations to Evidence in the Record

Defendants argue that Plaintiff is unable to demonstrate a genuine issue of material fact on at least one essential element of Plaintiff s RICO claim. In plaintiff's opposition and Statement of

Genuine Issues, he cites to no evidence in the record to demonstrate the existence of a genuine issue of material fact. The law in the Ninth Circuit is clear: the Court has no duty to "comb the record" in an effort to find a reason to deny a motion for summary judgment. *Forsberg v. Pac. Mv. Bell Tel Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988); *Keenan v. Allan.*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030-31 (9th Cir. 2001)[8];

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[8] As the court in Carmen explains:

The alternative, requiring the district court to search the entire record, even though the adverse party's response does not set out the specific facts or disclose where in the record the evidence for them can be found, is unfair. The cases often refer to the unfairness to the district court, which is substantial, but hardly the full story. If a district court must

Smith v. Marsh, 194 F.3d 1045, 1052 n.5 (9th Cir. 1999). "Judges are not like pigs, hunting for truffles buried in briefs." *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). A contrary rule, in addition to being unfair to the Court and other litigants, would prejudice the moving party. When a Court conducts an independent examination of the record to find evidence to deny Defendants' Motions, "the court becomes the lawyer for [Plaintiff], performing the

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examine reams or file cabinets full of paper looking for genuine issues of fact, as though the judge were the adverse party's lawyer, an enormous amount of time is taken away from other litigants. Other litigants could have that judicial time, and get their cases resolved better and faster, if the district court could limit examination to the materials submitted in opposition to the summary judgment motion.

lawyer's duty of setting forth specific facts showing that there is a genuine issue for trial" and Defendants are then "denied a fair opportunity to address the matter in the reply papers." *Carmen*, 237 F.3d at 1031.

The Ninth Circuit has held that local rules can provide the nonmoving party with adequate notice that the court will not look beyond opposition papers for evidentiary support. *Nilsson, Robbins, Dalgarn, Berliner Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988). In *Nilsson*, the court refers to a Central District Local Rule matching the exact language of the current local Rule 56-3. 854 F.2d at 1538. This rule states:

> In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material

> facts are (a) included in the "Statement of Genuine Issues" and (b) controverted by declaration or other written evidence filed in opposition to the motion.

L.R. 56-3. The court held that with local rules such as this, the nonmoving parties have sufficient notice that their opposition to a motion for summary judgment must identify genuine issues of material fact, and provide the court with evidence, without the district court's assistance. *Nilsson*, 854 F.2d at 1545.

Factual allegations, conclusory pleadings, legal memoranda, and oral argument are insufficient to establish a genuine issue of material fact and defeat a motion for summary judgment. *Smith v. Mack Trucks, Inc.*, 505 F.2d 1248, 1249 (9th Cir. 1974); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *Nilsson*, 854 F.2d at 1542 (citing *Radobenko v. Automated Equip. Corp.*, 520

F.2d 540, 543 (9th Cir. 1975); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) (citing *Smith*, 505 F.2d 1248, 1249 (9th Cir. 1974)). The Court is only required to review issues argued "specifically and distinctly" in briefs, and evidence in the record to which opposition papers specifically refer. *Entm 't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997); *Carmen*, 237 F.3d at 1030. Opposition papers must provide the court with "adequate references to [evidence], so that it c[an] conveniently be found." *Carmen*, 237 F.3d at 1031; *Taybron v. City and County of San Francisco*, 341F.3d 957, 960 (9th Cir. 2003). "[General references without page or line numbers" are insufficient. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003) (citing Cal.

Practice Guide: Federal Civil Procedure Before Trial § 14:101.1, at 14-24.2)). In this case, Plaintiff has not made any citations to the record, and the Court has no way of understanding what Plaintiff claims to be genuine issues of material fact.

In *Keenan*, the Ninth Circuit affirmed a district court's grant of summary judgment, finding no genuine issues of material fact where the plaintiff failed to support his arguments with specific citations to the record. 91 F.3d at 1275. plaintiff's counsel provided the court with voluminous unorganized evidence, without page numbers, in opposition to the defendant's motion for summary judgment. Id. at 1278-79. The plaintiff's briefs failed to clearly state the material facts in dispute, and the court noted that where it "has succeeded in locating the documents cited, it

has repeatedly found that [the plaintiff] has referred us to conclusory allegations made in her own affidavits and statements of fact presented to the district court, and to irrelevant or inadmissible evidence." *Id.* at 1279.

Similarly, in this action, Plaintiff has provided the Court with a Statement of Evidence and Declarations of Bruce H. Darian in opposition to the motions for summary judgment, which are unorganized, without page numbers, and difficult to follow. Plaintiff's opposition papers appear to be more recitations of the allegations in the Third Amended Complaint. Plaintiff has not cited to the record to support any of these disputed facts, and, like the plaintiff in *Keenan,* Darian has also failed to clearly demonstrate that a genuine issue of material fact exists.

This case also raises the same issues the Ninth Circuit dealt with in Carmen, 237 F.3d at 1026, where the plaintiff submitted an itemized list of dozens of disputed and undisputed facts in her opposition papers. *Id.* at 1028. The plaintiff's papers failed to dispute a material fact for which she had previously submitted supporting evidence to the court, however. *Id.* at 1029. The remaining facts the plaintiff listed did not demonstrate a genuine issue of material fact. *Id.* at 1028. The Ninth Circuit upheld the magistrate judge's decision to grant summary judgment because the statement supporting this material factual dispute was filed along with many other documents in the eight-inch thick case file, which the court was not obligated to review for summary judgment purposes. *Id.* at 1029-30 (agreeing with the Fifth,

Sixth, Seventh and Tenth Circuits that "the district court may limit its review to the documents submitted for the purposes of summary judgment and those parts of the record *specifically referenced therein.*") (emphasis added).

Although the Court is cognizant of plaintiff's pro se status, after three amended complaints, over eighty orders in response to at least as many motions, and seven years of litigation, the Court is confident that Plaintiff is aware of his obligations under the Federal and Local Rules and it can longer excuse his failure to comply with them. Plaintiff has been specifically advised of his responsibilities on numerous occasions, including most recently by Magistrate Judge Jeffrey Johnson, who, in his Minute Order in response to plaintiff's Request for Clarification of Order on Motion on

Joint Stipulation on Unresolved Matters, expressly stated, "[a]s a litigant representing himself, plaintiff has the responsibility to understand and abide by the Local Rules of this Court as well as the Federal Rules of Civil Procedure." (Docket no. 720, filed April 12, 2007.)

The Court has also been patient with Plaintiff and provided him with more than adequate time to file a proper opposition to Defendants' Motions. Defendants' Motions were filed on January 3 and 8, 2007, and originally noticed for a hearing date of January 29, 2007. Accordingly, plaintiff's opposition was initially due on January 16, 2007. Sympathetic to the fact that Plaintiff is a pro se litigant, the Court granted two of Plaintiff s Ex Parte Applications for Extensions of Time to File Oppositions to the Defendants'

Motions for Summary Judgment. (Docket nos. 692, 706.) Under the revised schedule, plaintiff's opposition was not due until March 26, 2007. Instead of as few as eight days, Plaintiff was provided with seventy-seven days in which to formulate a response that properly cited to admissible evidence in the record. Despite his knowledge of his obligation to file an opposition that comported with the Federal and Local Rules, Plaintiff failed to do so. The Court has given Plaintiff every opportunity to make his case and made every allowance possible for his pro se status, but it cannot further prolong this litigation by continuing to forgive his non-compliance with the law.

Without specific citations to evidence supporting plaintiff's alleged factual disputes,

Plaintiff has failed to demonstrate the existence of a genuine issue of material fact on any issue. In light of this, the Court shall consider only the undisputed facts Defendants presented in their Statements of Uncontroverted Facts and Conclusions of Law in determining whether Defendants are entitled to summary judgment on plaintiff's RICO claims.

II. Plaintiff's RICO Claims

Plaintiff claims that Defendants violated RICO by making threats against him, at least one of which constituted extortion. (TAC ¶¶ 966, 975.) Section 1962(c) of RICO prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate of foreign commerce, to conduct or participate, directly or indirectly in the conduct of

such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). Section 1962(d) prohibits conspiracy to violate RICO. *Id.* at § 1962(d).

Defendants argue that they did not violate RICO, because their conduct occurred over a period of only four months and therefore does not qualify as a "pattern" of racketeering activity under RICO. RICO requires at least two acts of racketeering activity within ten years of each other. 18 U.S.C. § 1961(5). Racketeering activities are defined as federal crimes and state law felonies. *Id.* at § 1961(1). A plaintiff must prove "continuity of racketeering activity, or its threat" in order to succeed in a RICO claim. *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241,109 S.Ct. 2893, 2902, 106 L.Ed.2d 195 (1989) plaintiff can

satisfy this standard by "referring either to a closed period of repeated conduct, [known as closed-ended continuity], or to past conduct that by its nature projects into the future with a threat of repetition of known as open-ended continuity]." *Id.*

"Acts occurring during a period of several weeks or months, with no threat of future criminal conduct, do[ ] not satisfy the continuity standard." *H.J. Inc.*, 492 U.S. at 242. For example, in *Religious Tech. Ctr. v. Wollersheim*, the court found that the alleged racketeering activity, which "continued for six months at most," did not satisfy the "continuity" requirement. 971 F.2d 364, 366 (9th Cir. 1992). It also noted that it was unable to find a case "in which a court has held the requirement to be satisfied by a pattern of activity lasting less than a year." *Id.*

Without a bright-line rule from the Supreme Court, the Ninth Circuit has adopted the "substantial period of time" test for determining closed-ended continuity. *Allwaste Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995). Applying this test in *Turner v. Cook*, the court concluded that the continuity requirement was not satisfied where the majority of the criminal activities occurred over two months, and additional criminal acts had "occurred only sporadically in the preceding year." 362 F.3d 1219, 1231 (9th Cir. 2004).

In the instant case, Defendants threatened Plaintiff during the four-month period between October 1999 and January 2000, including the specific threats between October and December 1999, and an extortion threat on October 27, 1999. (R. Federico Decl. at ¶ 11,14.) The conduct at issue

therefore occurred over a period one third shorter than that which the court found insufficient in *Religious Tech. Ctr.* Consequently, the Court finds that Plaintiff has failed to present evidence that the alleged predicate misconduct occurred over a substantial period of time. Similarly, the Court finds that Plaintiff has failed to present any evidence that there was any threat of future criminal conduct. See *Allwaste*, 65 3d at 1528 (holding that open-ended continuity may be satisfied by acts spanning a time period of less than one year if the conduct "by its nature projects into the future with a threat of repetition"). Accordingly, Plaintiff has failed to satisfy the continuity requirement of his RICO claims, and Defendants are entitled to summary judgment.

CONCLUSION

For the foregoing reasons, the Court GRANTS the Defendants' Motions for Summary Judgment (docket nos. 693 and 698). Within ten days of the date of entry of this Order, Defendants shall prepare and lodge a Judgment for the Court's signature.

IT IS SO ORDERED.

June 21, 2007

/s/
FLORENCE-MARIE COOPER
JUDGE UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE DARIAN, Individually
On His Own Behalf, aka SEAL 1
dba Darian Construction, Co.

No. 07-56777

D.C. No. CV-
Plaintiff-Appellant
00-10255-FMC
Central District
Of California,
Los Angeles

and

ORDER

USA, EX REL, as relator on
behalf of the United States
Government, aka Seal 2,
Dba Darian Construction Co.,

Plaintiff,

v.

ACCENT BUILDERS, INC.,
a California Corporation, aka
Seal A International Hardwoods,
Inc., aka Ronald E. Glousman,
MD, ANTHONY LAWRENCE
FEDERICO, aka SEAL B; et al.

Defendants-Appellees.

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Before: O'SCANNLAIN, SILVERMAN, and BYBEE, Circuit Judges

The appellant's opposed motion for a fifth extension of time to file the opening brief is denied.

The appellant's case is dismissed for lack of prosecution with prejudice to reinstatement. No motions for reconsideration, rehearing, clarification, or modification of this order's provisions will be entertained.

A copy of this order shall act as the court's mandate.

SOUTHERN CALIFORNIA NEUROLOGICAL
MEDICAL GROUP INC.
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Los Angeles , California 90048
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Ronald M. Andman M.D.
Diplomate American
Of Neurorehabilitation

Colin Stokol, MD
Diplomate American
of Psychiatry and
Neurology

March 2, 2009

RE: Darian, Bruce
DOB: 12/11/57

To Whom it May Concern:

Mr. Darian is my patient who has been under my care since September 2008. He has been seen because of complaints of intractable vertigo and instability of gait with balance diminution. The condition has remained persistent and it has not been clearly understood in terms of origin. He works in the construction industry and we have been concerned about safety in height and work spaces.

We have done numerous studies from the neurologic standpoint and the ENT standpoint, to try to understand the cause of the pathology. The studies obtained include a brain MRI done in August 2008, which was normal and brainstem auditory evoked response study which appeared unrevealing in terms of latencies, although definition was poor on the right side. An electrode/ nystagmogram was done by the ENT service suggesting left sided ear pathology.

The patient has had multiple consultations including myself (neurology) as well as , an ENT specialist (Dr. Flaum), a neurootologist at UCLA (Dr. Baloh), and Dr. Howard Allen.

A clear explanation for his symptoms has not been clearly delineated.

He remains symptomatic.

Respectfully yours,

/s/

Colin W. Stokol M.D.
CWS/km

cc: Eugene Flaum, M.D.
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